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No. 94-1989

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LITTON SYSTEMS, INC.,
Petitioner,
v.
MARTHA CARROLL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") moves for permission to file its Brief *Amicus Curiae* in support of Petitioner. The consent of Petitioner has been obtained, and a copy of the consent letter has been provided to the Clerk of this Court. The consent of Respondents was requested but refused.

The Chamber, which represents more than 220,000 member businesses, trade and professional associations, and state and local chambers of commerce, has a strong

interest in having the Fourth Circuit's decision reviewed by this Court. The Chamber believes that the Fourth Circuit's decision will encourage frivolous litigation in the federal courts and will obviate the opportunity for a defendant confronted with a toxic tort lawsuit to obtain summary judgment, even when this Court's precedent and a fair reading of the federal rules would otherwise ensure that summary judgment be granted. While Petitioner's Brief is of course factually devoted to its own case, the Chamber is aware that the Fourth Circuit's decision already has been cited in other toxic tort litigation. The Chamber's Brief identifies a broader perspective on the impact of the Fourth Circuit's decision on the business community at large than the Petitioner's Brief was intended or able to do. The Chamber's interest in the case is more fully set forth in the Statement of Interest of *Amicus Curiae* which appears in the proposed Brief, at page 2.

For the foregoing reasons, *amicus curiae* requests that this Court grant its motion.

Respectfully submitted,

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QUESTION PRESENTED

Whether a plaintiff is always entitled to have a jury decide the essential causation element of his toxic tort case, even where the exclusion of all his expert scientific opinion testimony has ended the only genuine dispute over that issue?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICUS CURIAE	2
REASONS FOR ALLOWING THE WRIT	3
I. THE FOURTH CIRCUIT'S INTERPRETATION OF *DAUBERT* IS CLEARLY WRONG IN THAT IT ELIMINATES THE NEED FOR A PLAINTIFF TO CARRY ANY PART OF HIS BURDEN OF "SCIENTIFIC" PROOF OF CAUSATION IN FAVOR OF ALWAYS LETTING THE JURY DECIDE, EVEN WHERE THE JURY HAS NOT BEEN GIVEN THE NECESSARY TOOLS BY WAY OF SCIENTIFIC OPINION TO RENDER A RELIABLE DECISION	3
II. THE FOURTH CIRCUIT'S DECISION IMPROPERLY FORCES JURY RESOLUTION OF ISSUES ABOUT WHICH THERE ARE NO GENUINE DISPUTES AND SO CONFLICTS WITH WELL-ESTABLISHED PRINCIPLES OF SUMMARY JUDGMENT	7
III. THE FOURTH CIRCUIT'S DECISION ALREADY HAS CREATED UNCERTAINTY AND POOR PRECEDENTIAL LAW IN ITS DISTRICT COURTS	10
CONCLUSION	12

TABLE OF AUTHORITIES

Cases Page

Abuan v. General Electric Co., 3 F.3d 329 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1064 (1994).. 9
Anderson v. Liberty Lobby, 477 U.S. 242 (1986)....7, 8, 10
Bocook v. Ashland Oil, Inc., 819 F. Supp. 530 (S.D.W. Va. 1993) 10
Bourjaily v. United States, 483 U.S. 171 (1987).... 9
Carroll v. Litton Systems, Inc., 47 F.3d 1164 (Table), 1995 U.S. App. LEXIS 2015 (4th Cir. 1995) (reprinted in App. at p. 1a) 3, 4, 5
Casey v. Ohio Medical Prods., 877 F. Supp. 1380 (N.D. Cal. 1995) 5
Celotex v. Catrett, 477 U.S. 317 (1986) 8, 9, 10
Chikovsky v. Ortho Pharmaceutical Corp., 832 F. Supp. 341 (S.D. Fla. 1993) 5
Christophersen v. Allied-Signal Corp., 939 F.2d 1106 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1280 (1992) 8
City of Heath v. Ashland Oil, Inc., 834 F. Supp. 971 (S.D. Ohio 1993) 10
Claar v. Burlington Northern R.R., 29 F.3d 499 (9th Cir. 1994) 8, 9
Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993) 2, 3, 6, 9
Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir. 1995) 9
Eggar v. Burlington Northern R.R., 1991 U.S. Dist. LEXIS 19240 (Dec. 18, 1991), *aff'd sub nom. Claar v. Burlington N. R.R.*, 29 F.3d 499 (9th Cir. 1994) 10
Fitzgerald v. Manning, 679 F.2d 341 (4th Cir. 1982) 8
Goeway v. United States, No. 2:92-2543-22, 1995 U.S. Dist. LEXIS 6992 (D.S.C. May 15, 1995).... 10, 11
Hodges v. Secretary of HHS, 9 F.3d 958 (Fed. Cir. 1993) 8
In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1253 (1995).. 10
Joiner v. General Elec. Co., 864 F. Supp. 1310 (N.D. Ga. 1994) 5

TABLE OF AUTHORITIES—Continued

	Page
O'Conner v. Commonwealth Edison Co., 807 F. Supp. 1376 (C.D. Ill. 1992), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 114 S. Ct. 2711 (1994)	10
Porter v. Whitehall Labs., Inc., 9 F.3d 607 (7th Cir. 1993)	8
Richardson v. Richardson-Merrell, Inc., 857 F.2d 823 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 882 (1989)	8
Rohrbough v. Wyeth Labs., Inc., 916 F.2d 970 (4th Cir. 1990)	8
Sakaria v. Trans World Airlines, 8 F.3d 164 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1835 (1994)	8
Schmaltz v. Norfolk & W. Ry., 878 F. Supp. 1119 (N.D. Ill. 1995)	5
Sorensen v. Shaklee Corp., 31 F.3d 638 (8th Cir. 1994)	9
Wade-Greaux v. Whitehall Labs., Inc., 874 F. Supp. 1441 (D.V.I.), *aff'd without op. sub nom. Greaux v. Whitehall Labs., Inc.*, 46 F.3d 1120 (3d Cir. 1994)	5
Rules	
Federal Rule of Civil Procedure 56(c)	7
Federal Rule of Evidence 104(a)	9
Fourth Circuit Internal Operating Procedure 36.6	10
Miscellaneous	
Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn. L. Rev. 1345 (1994)	7

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Amicus curiae respectfully prays that this Court grant Litton System, Inc.'s Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. Petitioner, but not Respondent, has consented to the filing of this *amicus* brief, and a motion for leave to file accompanies the brief. Correspondence evidencing Petitioner's consent has been provided to the Clerk of this Court.

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the largest voluntary membership business association in the world. The Chamber represents more than 220,000 member businesses, trade and professional associations, and state and local chambers of commerce before the Executive Branch, the United States Congress, the federal courts, and independent federal regulatory agencies. In cases, such as this one, of importance to the business community at large, the Chamber regularly offers *amicus* assistance to the Court.

The Chamber's members have a strong interest in having the Fourth Circuit's decision reviewed by this Court. The Chamber's members recognize, and make business decisions which must take into account, the threat of speculative litigation. Those economics are at best uncertain and at worst catastrophic, but this Court recently provided one measure against which the Chamber's members could better evaluate the threat: the framework offered by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). *Daubert* was designed to ensure that jury verdicts in complex toxic tort cases are rationally based on reliable, relevant scientific knowledge. In stark contrast, if allowed to stand, the Fourth Circuit's decision will allow a jury to render a verdict in favor of a plaintiff in toxic tort litigation even when there is admittedly *no* scientific knowledge because all of the plaintiff's proffered expert evidence has been found unreliable and all of his expert evidence has therefore been properly excluded.

The Chamber believes that the Fourth Circuit's decision will encourage frivolous litigation and will spur other plaintiffs wrongly to seek redress for alleged toxic tort injuries even in the absence of scientific evidence, because the decision establishes that there is no penalty for a violation of *Daubert*: the "scientific" evidence is excluded, but the jury is still permitted to decide the "scientific"

issues. The law has never been this way before, and the Chamber's members now are left to contemplate a rule that rewards specious claims lacking the requisite causation evidence. The Chamber urges this Court to review the decision below.

REASONS FOR ALLOWING THE WRIT

I. THE FOURTH CIRCUIT'S INTERPRETATION OF *DAUBERT* IS CLEARLY WRONG IN THAT IT ELIMINATES THE NEED FOR A PLAINTIFF TO CARRY ANY PART OF HIS BURDEN OF "SCIENTIFIC" PROOF OF CAUSATION IN FAVOR OF ALWAYS LETTING THE JURY DECIDE, EVEN WHERE THE JURY HAS NOT BEEN GIVEN THE NECESSARY TOOLS BY WAY OF SCIENTIFIC OPINION TO RENDER A RELIABLE DECISION.

This Court held, recently and unequivocally, that a jury must rest its decision on scientific evidence that rises to the level of "scientific knowledge," *i.e.*, evidence that is both reliable and relevant. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). The Fourth Circuit subsequently held in this case, just as unequivocally, that a jury need not do so. *Carroll v. Litton Systems, Inc.*, 47 F.3d 1164 (Table), 1995 U.S. App. LEXIS 2015 (4th Cir. 1995) (unpublished *per curiam* majority opinion and dissenting opinion reprinted in Petitioner's Appendix ("App.") at 1a). The Fourth Circuit's grossly improper unilateral departure from *Daubert* warrants review by this Court.

On the record as it stands today, Respondents have no expert testimony on any of the following, though their complex toxic tort case depends on a jury conclusion that each of the following occurred, more probably than not: [1]

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[1] The Chamber adopts by reference, and refers the Court to, the Statement of the Case as presented in the Petition at pp. 2-7. The magistrate's Recommended Findings of Fact and Conclusions

(1) that trichloroethylene ("TCE") was present in Respondents' well water from about the time the wells were dug, or 16 years before TCE was ever in fact measured in the water. (Respondents' *expert* evidence on this point was excluded—properly so, according to the Fourth Circuit—because it was "unreliable," was inconsistent with certain concessions the expert made, and had been offered without "any support." [2]);

(2) that TCE was present in Respondents' well water, in toxicologically significant levels, for all or certain of those 16 years, even though the only actual measurements identified toxicologically *in*significant levels. (Respondents' *expert* evidence on this point was excluded—again, properly so, according to the Fourth Circuit—because "unreliable," "imprudent," and "prone to enormous error," and because it had been offered "with absolutely no scientific support." [3]);

(3) that Respondents individually had actual exposure to the TCE in sufficient quantities and/or for a sufficient duration to have possibly caused them any harm. (Respondents' *expert* evidence on this point was excluded—again, properly so—because it was based on the unreliable, decidedly unscientific theories that Respondents had used to "back-calculate" the levels of the TCE to begin with.[4]); and

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of Law, which appear in the Appendix at pp. 48a-180a, provide a more comprehensive overview of the entire litigation.

[2] *See* courts' discussions of testimony of Respondents' hydrogeologist Mr. Gerald Moore. App. at 5a-6a, 9a-10a, 68a-73a, 77a, 130a-134a, 198a-201a.

[3] *See* courts' discussions of testimony of Respondents' chemodynamist Dr. Hugh Spencer. App. at 6a-7a, 10a, 71a-77a, 131a-134a, 201a-204a.

[4] *See* courts' discussions of testimony of Respondents' exposure expert Dr. George Rodgers. App. at 7a, 11a, 83a, 99a-107a, 141a-142a, 213a-216a.

(4) that Respondents' exposure to the TCE in fact caused their claimed injuries. (Respondents' *expert* evidence on this point was excluded—again, properly so—because the only method by which Respondents' medical experts could reach their specific causation opinions required them to rely upon the "unreliable," foundationless, "imprudent," and error-prone data which Respondents proffered with respect to exposure, and such a method plainly failed *Daubert's* scientific knowledge test.[5])

On remand, the jury will be invited to "infer" answers to these essential elements of Respondents' case, despite the fact that Respondents' experts' efforts to answer these very inquiries "scientifically" were dismissed as wholly unreliable by both courts that reviewed those efforts. This consequence is illogical and unwise.

In keeping with *Daubert,* Petitioner conducted discovery, submitted detailed presentations of proof, argued its position at an oral hearing, and in fact carried its limited burden to show that Respondents' evidence was not scientific, as both the trial court and the appellate court found.[6] Petitioner acted just as the Chamber would have urged any one of its members to act if the member were

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[5] *See* courts' discussions of Respondents' medical experts Drs. Rodgers, Alan Broughton and Robert Feldman. App. at 11a, 85a-107a, 136a-143a, 209a-216a.

[6] Since *Daubert,* Petitioner's approach has become routine, if not required, for defendants in a toxic tort setting, enabling district courts to conduct the requisite independent and detailed review of disputed expert testimony. *See, e.g., Schmaltz v. Norfolk & W. Ry.,* 878 F. Supp. 1119, 1123 (N.D. Ill. 1995) (summary judgment after thorough review and exclusion of expert testimony in toxic tort case); *Casey v. Ohio Medical Prods.,* 877 F. Supp. 1380, 1384-85 (N.D. Cal. 1995) (same); *Wade-Greaux v. Whitehall Labs., Inc.,* 874 F. Supp. 1441, 1445 (D.V.I.) (same), *aff'd without op. sub nom. Greaux v. Whitehall Labs., Inc.,* 46 F.3d 1120 (3d Cir. 1994); *Joiner v. General Elec. Co.,* 864 F. Supp. 1310 (N.D. Ga. 1994) (same); *Chikovsky v. Ortho Pharmaceutical Corp.,* 832 F. Supp. 341 (S.D. Fla. 1993) (same).

confronted with a plaintiff's—or, as here, multiple plaintiffs'—insupportable allegations of injury. In Petitioner's case, as was proper under *Daubert,* the unscientific evidence (*all* of Respondents' expert evidence on exposure and individual medical causation) dropped out. But the Fourth Circuit's subsequent decision nevertheless to send the case to the jury demonstrates that its application of *Daubert* was illusory.

Daubert's central teaching is unambiguous: "overarching" concerns of scientific validity control the inquiry when scientific judgments are at issue. Indeed, the *Daubert* Court fully recognized—addressing arguments of the *Daubert* petitioners and their *amici*—that the screening role it envisioned for federal judges would "inevitably" prevent some *authentic* (but yet-untested) scientific opinions from becoming the basis for a jury's decision. This Court accepted that cost as one which must be paid in order to achieve fairness, balance, and legal certainty in the courtroom.[7] Here, in offering the jury unbridled discretion to draw its own (assuredly untested) conclusions where science has reached none, the Fourth Circuit reweighted the balance this Court struck and, in so doing, so far overcompensated for the concern that a plaintiff have his day in court that it rendered *Daubert* meaningless. In short, *Daubert* is not self-executing; if the jury is permitted to decide the ultimate issue no matter what the quality of the admitted or admissible evidence, then speculation rather than science remains the touchstone of the verdict. If, instead, conclusions may only *reliably* be drawn, the trial court must take this case and cases

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[7] *See* 113 S. Ct. at 2798-99 ("We recognize that in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.").

like it away from the jury on the day the court finds that good science cannot support one party's theory. The Chamber had—up to now—thought that this Court answered this exact inquiry in *Daubert*. The decision below throws the issue in doubt.

The Fourth Circuit's decision should not be allowed to stand; the business community needs to know that this Court's rule of good science still applies and will be uniformly enforced.

II. THE FOURTH CIRCUIT'S DECISION IMPROPERLY FORCES JURY RESOLUTION OF ISSUES ABOUT WHICH THERE ARE NO GENUINE DISPUTES AND SO CONFLICTS WITH WELL-ESTABLISHED PRINCIPLES OF SUMMARY JUDGMENT.

The Chamber believed it well settled in complex toxic tort personal injury litigation that "when the defendant succeeds in excluding the plaintiffs' experts on a crucial element of the plaintiffs' case, summary judgment follows as a matter of course." Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test,* 78 Minn. L. Rev. 1345, 1376 (1994). This tenet merely tracks Rule 56(c) of the Federal Rules of Civil Procedure, which provides that "[t]he judgment sought shall be rendered forthwith if the [pleadings, discovery, and affidavits] show that there is no *genuine issue* as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Emphasis added.)

An "issue" is not "genuine" if the evidence which supports it is insufficient for the jury to find in favor of the party who offers the evidence. *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986). In *Anderson,* this Court instructed trial judges to "bear in mind the actual quantum and quality of proof necessary to support liability" and explained that if the non-moving party's evidence was "of insufficient caliber or quantity" then no *genuine*

issue of material fact was raised. 477 U.S. at 254. In toxic tort litigation, a *genuine* issue of material fact with respect to causation can *only* be created in the context of contending adverse experts because, in such litigation, scientific expert testimony is the *only* sufficient means of proof.[8] It follows by rote that where one side in a toxics dispute fails to present an admissible expert opinion, no *genuine* issue of material fact remains.[9] As in *Celotex v.*

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[8] Prior to Petitioner's case, the principle that expert testimony is required in such cases had been recognized both in the Fourth Circuit, *e.g., Rohrbough v. Wyeth Labs., Inc.*, 916 F.2d 970, 972 (4th Cir. 1990) ("proof of causation must be by expert testimony") (toxic tort suit); *see also Sakaria v. Trans World Airlines*, 8 F.3d 164, 173 (4th Cir. 1993) ("resolution of the causation issue is dependent upon expert opinion testimony") (wrongful death action), *cert. denied*, 114 S. Ct. 1835 (1994); *Fitzgerald v. Manning*, 679 F.2d 341, 350 (4th Cir. 1982) ("proof of causation . . . requires expert testimony") (medical malpractice claim), and elsewhere, *e.g., Claar v. Burlington Northern R.R.*, 29 F.3d 499, 504 (9th Cir. 1994) ("expert testimony is necessary to establish even that small quantum of causation required by [Federal Employees Liability Act]" in toxic tort suit); *Hodges v. Secretary of HHS*, 9 F.3d 958, 961 (Fed. Cir. 1993) ("[c]ausation in fact requires proof of a logical sequence of cause and effect" supported by "medical or scientific explanation" in statutory toxics claim); *Porter v. Whitehall Labs., Inc.*, 9 F.3d 607, 612 (7th Cir. 1993) ("expert testimony is necessary to determine the cause" of the injury in toxic tort suit); *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1109-10 (5th Cir. 1991) (without expert testimony, plaintiff could not prove toxic exposure caused injury), *cert. denied*, 112 S. Ct. 1280 (1992); *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 829 (D.C. Cir. 1988) (the question of specific causation in a toxic tort suit "is scientific in nature, and it is to the scientific community that the law must look for an answer. . . . [E]xpert witnesses are indispensable in a case such as this."), *cert. denied*, 493 U.S. 882 (1989). Indeed, until *Carroll*, the Chamber had thought it self-evident that in complex medical toxic tort cases, the inferences that must be drawn on specific causation are well beyond the ken of ordinary laymen and so require expert testimony.

[9] *See, e.g., Rohrbough*, 916 F.2d at 976 (in absence of admissible expert testimony on causation, no genuine issue of material fact

Catrett, 477 U.S. 317, 325 (1986), Petitioner was entitled to discharge its burden on summary judgment merely "by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case."

In juxtaposition with *Daubert*, then, *Celotex* and similar cases compel summary judgment in complex toxic tort litigation where, as here, the moving party successfully "point[s] out to the district court" that "there is an absence of ['scientific knowledge'] to support the nonmoving party's case." [10] On the record today, Respondents' expert evidentiary "quantum" is zero, and Respondents' expert evidentiary "quality" fails the "preponderance" of reliability standard established in *Daubert*.[11] If this case is not the stuff of summary judgment in post-*Daubert*

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remains); *see also Sorensen v. Shaklee Corp.*, 31 F.3d 638 (8th Cir. 1994) (absent admissible expert testimony in a toxic tort case, "plaintiffs' evidence is insufficient as a matter of law to establish the requisite element of causation"); *Claar*, 29 F.3d at 504 ("Plaintiffs, not having proffered any admissible expert testimony, have no evidence that workplace exposure to chemicals played any part, no matter how small, in causing their injuries. Accordingly, there is no genuine issue of material fact concerning . . . causation. . . ."); *Abuan v. General Electric Co.*, 3 F.3d 329, 333-34 & n.4 (9th Cir. 1993) (plaintiffs' failure to provide admissible expert testimony on "individual causation" mandates summary judgment), *cert. denied*, 114 S. Ct. 1064 (1994).

[10] *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) (on remand, affirming summary judgment) ("Because plaintiffs bear the ultimate burden of proof on causation, Merrell had only to point to the absence of a genuine issue of material fact. . . .").

[11] *Daubert* requires the trial court to make its determination about the admissibility of "scientific" evidence pursuant to Federal Rule of Evidence 104(a). (The text of Rule 104(a) is reprinted at App., p. 241a.) The Rule 104(a) inquiry requires the proponent of the scientific testimony to show by a preponderance of the evidence that the testimony is admissible. 113 S. Ct. at 2796 n.10 (citing *Bourjaily v. United States*, 483 U.S. 171 (1987)). Respondents here failed the requisite evidentiary showing.

toxics litigation, then no case is. As Justice Rehnquist observed in *Celotex*, summary judgment exists not in a vacuum, but rather as "an integral part" of a system of federal rules and standards. 477 U.S. at 327. *See Anderson*, 477 U.S. at 254 ("in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden").

III. THE FOURTH CIRCUIT'S DECISION ALREADY HAS CREATED UNCERTAINTY AND POOR PRECEDENTIAL LAW IN ITS DISTRICT COURTS.

Carroll's unpublished status does not mitigate the harm it causes.[12] For example, at least one district court—curiously, within the Fourth Circuit, despite that circuit's local rule expressing disfavor with the citation of its unpublished decisions as precedent[13]—already has cited and attempted to rely upon the Fourth Circuit's decision at issue here. In *Goeway v. United States*, No. 2:92-2543-22, 1995 U.S. Dist. LEXIS 6992, at *37-38 (D.S.C. May 15, 1995), a toxic tort case involving exposure to pesticides, the court ignored in wholesale fashion all parts of the Fourth Circuit case which did not jibe with *Daubert* or well-established summary judgment law. The

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[12] Though not officially published, the Fourth Circuit and district court opinions are widely available on electronic databases. The district court opinion has been cited in federal courts in Pennsylvania, Ohio, West Virginia, Illinois, and Montana. *See In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1253 (1995); *City of Heath v. Ashland Oil, Inc.*, 834 F. Supp. 971 (S.D. Ohio 1993); *Bocook v. Ashland Oil, Inc.*, 819 F. Supp. 530 (S.D.W. Va. 1993); *O'Conner v. Commonwealth Edison Co.*, 807 F. Supp. 1376 (C.D. Ill. 1992), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 114 S. Ct. 2711 (1994); *Eggar v. Burlington N. R.R.*, 1991 U.S. Dist. LEXIS 19240 (Dec. 18, 1991), *aff'd sub nom. Claar v. Burlington N. R.R.*, 29 F.3d 499 (9th Cir. 1994).

[13] *See* Fourth Circuit Internal Operating Procedure 36.6, *reprinted in* App. at 240a.

Goeway court instead cited *Carroll* for the proposition that plaintiffs had the burden to prove causation but could *not* carry that burden after each of their experts' testimony was excluded under *Daubert*. The *Goeway* court described *Carroll* as "markedly similar," referred to the Fourth Circuit's exclusion of the unreliable expert evidence, and concluded that *Carroll* "reinforced" its own assessment that the defendants were entitled to summary judgment after plaintiffs' "experts fail[ed] to produce reliable evidence of causation." 1995 U.S. Dist. LEXIS 6992, at *38. This cryptic use of the *Carroll* precedent portends the future conflict and disruption the Chamber fears.

It is entirely unsettling to the business community that district courts must, or even may, pick and choose between good law and bad law as issued by the higher courts to which the district court answers. The *Goeway* court cannot be faulted; it presumably observed no means by which to reconcile *Carroll* with *Daubert*, Fourth Circuit causation (published) precedents, and a host of summary judgment precedents, and wisely applied the latter. The Chamber and the members it represents, however, depend heavily on predictability in the law, at least insofar as the law has been set by this Court and—where there is no conflict—by the federal courts of appeal and state supreme courts. The Chamber expects and needs precedent to be followed, by both the courts of appeal and the district courts as well.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges this Court to review—and, ultimately, to overturn—the Fourth Circuit's decision that allows its juries to decide the very "scientific" issues about which even qualified experts testifying in its courts admittedly cannot opine without violating *Daubert*.

Respectfully submitted,

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